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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 516

J. T. ROBERTS, *Appellant*,

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. McINNIS, Directors of the Richland Irrigation District, an Irrigation District, and HARRY FORSYTH, Treasurer of Benton County, Washington; R. J. PACTUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, Intervenors, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Petition of the Appellant for Rehearing

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Petition of the Appellant for Rehearing

Comes now the above named appellant, J. T. Roberts, and presents this, his petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

I.

The opinion of this court declares the assessment in question to be a general tax. This holding is in conflict with the decisions of the State court construing the statute; in conflict with the holdings of this court in the case of *Kadow et al. v. Paul et al.*, 274 U. S. 175; in conflict with the express admissions of counsel for the appellees on oral argument; and in conflict with the generally accepted concepts of the Bench and Bar of the State of Washington, as evidenced by the decisions of that State. The decision goes beyond any contention made by counsel for the appellees, and only indirectly takes cognizance of the basic contention upon which the appellant rests his case.

II.

The Supreme Court of the State of Washington has never declared that the levy of an irrigation district is a general tax. The language of the cases cited in appellant's brief (pages 17 to 30 and 58 to 72) clearly establishes that such a tax is a special assessment for

a local improvement and specifically negatives the contention that it is a general tax.

In *Columbia Irrigation District v. Benton County et al.*, 149 Wash. 237, 238; 270 Pac. 813, 815, the court adopts and reaffirms the language used *In re Riverside Irrigation District*, 129 Wash. 627; 225 Pac. 636:

> " 'It is argued, however, in support of the view that these irrigation districts are municipal corporations in a larger sense than we have suggested, *that they possess general taxing power;* that is, power to levy taxes without regard to proportional benefits flowing to private property within the district, as well as taxation by local special assessments burdening property in proportion to benefits. Are we in error in assuming that this is not so?' " (Italics ours.)

and the further language in that opinion which gives a negative answer to the question propounded, thereby specifically holding that the tax is not a general tax, as assumed by this court in its opinion herein.

This declaration of the State court in *Columbia Irrigation District v. Benton County, et al., supra,* is made in the light of and with specific reference to the case of *State ex rel Clancy v. Columbia Irrigation District et al.*, 121 Wash. 79; 208 Pac. 27, which is therein cited and discussed, and which it was the evident intent of the State court to limit.

The only basis for this court's declaration that the tax questioned herein by appellant is a general one is found in certain equivocal expressions of the State court herein, which are based on language found in *State ex rel. Clancy v. Columbia Irrigation District, et al, supra,* and in *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590; 274 Pac. 181, to the effect that the *bond obligation is a general one* and that an irrigation district exercises certain functions of a municipal corporation. It is affirmatively established by the decisions of the State court that such expressions were not intended to and did not reverse or modify the other State decisions above set out. In *Columbia Irrigation District v. Benton County, et al., supra,* it is said on page 238, in 149 Wash., and on page 815 in 270 Pac.:

> "In the cases of *Peters v. Union Gap Irrigation District,* 98 Wash. 412; 167 Pac. 1085, and *State ex rel. Clancy v. Columbia Irrigation District,* 121 Wash. 79; 208 Pac. 27, there is general language referring to irrigation districts as municipal corporations. In each of those cases the court was considering a function which is necessary to the existence of a municipal corporation in the strict and proper sense; in the one, the right to sue and be sued; and in the other, the right to make contracts. *It was only in relation to these two functions that it was said that irrigation districts were municipal corporations.* It would have been more accurate to have said that irrigation districts are agencies of the State

> created by the legislature for certain definite purposes and that they might be considered quasi-municipal corporations." (Italics ours.)

Thus this declaration of the State court that the tax is not a general tax was made upon the specific consideration of *State ex rel. Clancy v. Columbia Irrigation District, et al., supra.*

The decision of this Court herein that this tax is a general one is rested solely upon language derived from the opinion of the State court herein. The latter rests on *State ex rel. Wells v. Hartung et al., supra,* which in turn rests on *State ex rel. Clancy v. Columbia Irrigation District et al., supra.* But as shown, the case of *State ex rel. Clancy v. Columbia Irrigation District, et al., supra,* has been modified and limited by the State court.

That it was not the intent of the State court to reverse *Board of Directors of the Middle Kittitas Irrigation District v. Peterson,* 4 Wash. 147; 29 Pac. 995, and the cases following it which establish the nature of an irrigation district and that the tax levied by it is a special assessment, is evident from the fact that *Board of Directors of the Middle Kittitas Irrigation District v. Peterson, supra,* is cited by the court in *State ex rel. Wells v. Hartung, et al., supra,* as determinative of the constitutionality of the Act.

We respectfully submit that, if the declaration of this court that this tax is a general one rested upon the proposition that the State court has so construed the Act, consideration should be given to all of the decisions of the State court and not solely to equivocal expressions drawn from some of the decisions.

III.

The language used in *State ex rel. Clancy v. Columbia Irrigation District et al., supra,* was before this court in *Kadow et al. v. Paul et al., supra.* The former case had been declared by the State court to apply to drainage and dyking district law in exactly the same manner that it applied to an irrigation district. The statutory provisions construed in *Kadow et al. v. Paul et al., supra,* with reference to the language of *State ex rel. Clancy v. Columbia Irrigation District, et al., supra,* are almost verbatum with those presented in this case. The contention of the appellant was identical with that of the appellant herein. The only distinction between the two cases is the fact that there had been no application of the statute in that case. There has been an application in the instant case.

This court held that the levy was a special assessment limited to benefits, not a general tax. The State

court has so construed and applied its declaration in two subsequent cases:

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647.

Perkins & Co. v. Diking District No. 3 of Island County, 162 Wash. 227; 298 Pac. 462.

These decisions of the United States Supreme Court and the Supreme Court of the State of Washington, construing identical statutes of this State, are clearly pertinent but are not discussed or distinguished.

We respectfully submit that a determination of whether this tax is a special assessment or a general tax cannot be made without reference to these decisions of this court and our own State Supreme Court; and that the decisions, cited in this court's opinion herein, based upon facts arising in another State and dealing with municipal corporations whose functions and powers are defined by wholly different statutes, are persuasive only and should not be permitted to over-ride the repeated declarations of the Supreme Court of the State whose statute is being construed.

IV.

On oral argument before this court, counsel for appellees admitted that the constitutional basis for

this tax must rest on benefits. In fact throughout the pendency of this litigation, it has never been seriously contended by any party hereto that this was a general tax. The discussion on pages 17 to 30 and 58 to 72 in appellant's opening brief before this court is not controverted nor is the conclusion drawn therefrom denied. Furthermore, it would appear from a careful reading of appellees' brief filed in this court, as well as in the State Supreme Court, that counsel for the appellees assumed without discussion that the levy was a special assessment, only justified by and based on benefits.

V.

A reading of the several State decisions set forth and discussed on pages 17 to 35 and 58 to 72 of appellant's brief demonstrates a generally accepted concept of the courts and the Bar of this State that, under the uniformity provisions of the State constitution, the constitutionality of this Act can be sustained *only by establishing its levy as a special assessment.* To hold this tax a general tax is to utterly invalidate the Act, with consequent economic chaos, in solvent and insolvent districts alike. To sustain the contention of the appellant and establish the levy as a special assessment, on the other hand, will affirm the constitutionality of the Act in all respects and merely

require a limitation in the amount of individual assessments in the insolvent districts.

The Supreme Court of the State, in *Board of Directors of the Middle Kittitas Irrigation District v. Peterson, supra,* and this court in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112; 17 Sup. Ct. 56, have declared that the constitutional problems affecting the operation of this Act are of such great public and economic importance as to justify a meticulous and painstaking examination of the contentions of the parties, and to require a reference of decisions made to a consideration of legal fundamentals.

We respectfully submit that, insofar as the opinion of this court in this case holds that this levy is a general tax, it is rested only upon the quoted declarations from a *single* opinion of the State court and, insofar as it is in obvious conflict with numerous other decisions of that court as well as the decision of this court in *Kadow et al. v. Paul et al., supra,* it will result in a confusion which will be costly to the public, to the landowner, the irrigation district, and the bondholder.

VI.

In all its history, the State court has never expressly referred to the levy of an irrigation district

as a general tax. In many cases it has referred to it as a special assessment and has used arguments and applied rules which could only be pertinent to the consideration of a special assessment. The language of the State court in *State ex rel. Clancy v. Columbia Irrigation District et al., supra, State ex rel. Wells v. Hartung, et al., supra,* and the instant case does not use the expression "general tax." If this court construes that language to be the equivalent of a declaration that the tax is a general tax, then we have merely a clean cut conflict between the decisions of the State court.

The brief of appellees (p. 22) acknowledges the existence of such a conflict but declines to explain it. Briefs of the appellant demonstrate the possible conflict and submit arguments, supported by carefully chosen citations, to the effect that those decisions which characterize and discuss the levy as a special assessment conform to the fundamental law of the land.

In these circumstances this court is at liberty to construe the statute and adopt those decisions of the State court which are constitutionally sound. In the instant case this will require a consideration of *Board of Directors of the Middle Kittitas Irrigation District v. Peterson, supra,* and the other State de-

cisions set forth on pages 17 to 35 of appellant's brief, to which no reference is made in this court's opinion herein.

Assuming that the language employed by the State court herein and in *State ex rel. Wells v. Hartung et al., supra, impliedly labels this levy as a general tax*, this court is not bound by the State court's designation and characterization of the tax, but is at full liberty to determine for itself the nature of the levy.

> *Louisville Gas Company v. Coleman*, 277 U. S. 32, 38;
>
> *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 401.

St. Louis Cotton Compress Co. v. State of Arkansas, 260 U. S. 346, wherein it is said on page 348:

> "But this court, although bound by the construction that the Supreme Court may put upon the Statute, is not bound by the characterization of it, so far as that characterization may bear upon its constitutional effect."

St. Louis Southwestern Railway Co. v. State of Arkansas, 235 U. S. 350, wherein it is said on page 362:

> "Upon the mere question of construction we are of course concluded by the decision of the State court of last resort, but when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal constitution, the decision is not dependent upon the form

> in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State." (Citing many cases.)

This can be done only by a consideration of the powers and functions of the taxing district, as established by the Statute, and all pertinent decisions of the State court construing them. *State ex rel. Clancy v. Columbia Irrigation District, et al., supra, State ex rel. Wells v. Hartung et al., supra,* and the instant case do not attempt to declare what powers are possessed by an irrigation district. In *Columbia Irrigation District v. Benton County, et al.,* 149 Wash. 237, 238; 270 Pac. 813, 815, the Supreme Court expressly defines the language employed in *State ex rel. Clancy v. Columbia Irrigation District et al., supra,* and specifically states what powers of a municipal corporation an irrigation district possesses, namely, the right to sue and be sued, and the right to make contracts:

> "It was only in relation to these two functions that it was said that irrigation districts were municipal corporations."

No decision of the State Supreme Court has ever held or intimated that an irrigation district exercises any governmental functions. No decision of the Supreme Court of the United States or of the State has

ever held that the power of general taxation might be exercised by a municipal corporation exercising no governmental functions. No authority is cited by opposing counsel to sustain the proposition that a general tax might be levied by a corporation exercising no governmental function. Nowhere in appellees' briefs is it contended that an irrigation district does exercise a governmental function. The contention of appellant, that the exercise of a governmental function is absolutely essential to the power to levy a general tax, is unanswered in the briefs of appellees and unnoted in the opinions herein, yet it absolutely negatives the possibility that the tax in question is a general tax.

We submit that this case is clearly distinguishable from one in which a municipal corporation like the City of New York, admittedly exercising governmental functions, is involved, and that the cause should be determined by a critical analysis of the decisions of the State court which define the powers of a municipal corporation. The power to levy general taxes is inseparable from the exercise of governmental functions. The State court has declared that an irrigation district exercises no such governmental functions, and we respectfully request a reconsideration of the argument on this point.

VII.

We fully appreciate the fact that a petition for a rehearing in this court is justified only in the most extraordinary circumstances. We believe those circumstances are present. A question of vast public interest is involved. The decision of the court has gone far beyond the contention of the appellees, and an application thereof would result in widespread economic disaster in the irrigated districts in this State.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Supreme Court of the State of Washington herein be, upon further consideration, reversed.

Respectfully submitted,

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Of Counsel.

CERTIFICATE OF COUNSEL

I, R. J. VENABLES, one of the counsel for the above named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

R. J. VENABLES,
Attorney for Appellant.